KENG SOON FINANCE BHD.

v.

MK RETNAM HOLDINGS SDN. BHD.; BHAGAT SINGH SURAIN SINGH & ORS. (INTERVENERS)

HIGH COURT MALAYA, KUALA LUMPUR
DATO' ANUAR ZAINAL ABIDIN J
[ORIGINATING SUMMONS NO: F432 OF 1981]
3 JUNE 1996

CONTRACT: *Illegality - Contravention of law - Housing Developers (Control & Licensing) Act 1966, s. 5(1) - Contract entered into in contravention of Act - No express prohibition in Act - Whether contract illegal - Duty of Court - To ascertain whether contract prohibited by Act - Whether contract void and unenforceable - Contracts Act 1950, s. 24.*

CONTRACT: *Void contract - Contrary to public policy - Whether void and unenforceable - Whether illegal - Contract to commit common law or statutory crime - Entered into with intention of committing crime - Whether intention still important if contract is illegal ex facie due to contravention of statute - Whether Court will take judicial notice of illegality although not pleaded by defendant.*

CONTRACT: *Illegality - Whether plaintiff was particeps criminis - Whether Court will interpose actively in favour of particeps criminis to an illegal or fraudulent transaction - Whether plaintiff was aiding and abetting or assisting an unlicensed housing developer.*

CONTRACT: *Sale and purchase of land - Whether plaintiff deemed to be aware of illegality of the charge - Whether plaintiff had a developer's license to provide money for housing development - Or authority to provide finance for unlicensed housing development - Whether plaintiff could receive security - Whether purported charge was a nullity - Whether capable of being registered to create security over land.*

LAND LAW: *Housing developers - Sale and purchase agreement - Housing Developers (Control & Licensing) Rules 1970, r. 12(1) - Mandatory clauses for consumer protection - Whether clauses in agreement inserted with intention of circumventing the mandatory clauses - Whether clauses infringed on substance of r. 12(1) - Purported conferment of authority on defendant to create charge binding on purchasers - Whether tenable.*

LAND LAW: *Charge - Whether charge took effect under s. 243 of National Land Code 1965 upon registration - Whether instrument of dealing void ab initio - Whether instrument void for purposes of*

registration - Whether capable of being registered - Whether capable of effecting a charge over land - Whether there was an effective or valid registered charge as envisaged by National Land Code 1965 - Whether plaintiff should be granted order for sale.

LAND LAW: *Indefeasibility of title and interests - Torrens system - Whether registration cures defects - Whether still true if relevant statute denies this - National Land Code 1965, s. 340(2)(b) - Court cannot cure defect in instrument - Consequence of registration - Deferred indefeasibility - Whether title or interest of defendant free from encumbrance of the purported charge - Whether free from interest of 1st intervener.*

LAND LAW: *Sale and purchase of land - Whether National Land Code 1965 can authorise sale of land subject to charges lawfully created under s. 241 - Section 256 - Whether there was sufficient cause to the contrary - Whether plaintiff's application for order for sale should be dismissed.*

WORDS & PHRASES: *'Cause to the contrary' - National Land Code 1965, s. 256(3).*

This was an exceptional case which went before the instant Court on remission from the Judicial Committee of the Privy Council ('the PC'). The plaintiff had appealed to the PC against the Federal Court's dismissal of its appeal from the High Court's refusal to grant an order for sale in respect of certain lands of which the plaintiff was the chargee. The PC allowed the appeal and advised that the order of the High Court dismissing the plaintiff's originating summons ('the OS') be discharged. In addition, the PC advised that the OS be remitted to the then Supreme Court for the determination of all questions of fact and law arising from the new points raised by the 1st intervener. The Supreme Court then ordered that the OS be remitted to the High Court for the determination of the same.

The OS was commenced by the plaintiff in 1981, seeking an order that certain lots of land in Perak ('the lots'), which were charged to the plaintiff by the defendant, be sold by public auction to satisfy the total sum due and owing to the plaintiff from the defendant.

In 1978, the defendant had applied to the plaintiff for a loan ('the loan') to finance the development of the lots. At that time, the majority of the lots had been sold to purchasers (the 1st intervener herein being a purchaser) under sale agreements ('the agreement') which provided for initial deposits and progressive payments as the buildings erected thereon progressed. The agreement contained the following two clauses: (cl. 3) Subject to the provisions of cl. 4 hereof, the purchaser agrees that the vendor may subject the land sold to the purchaser to encumbrances at any time after the signing of this agreement; and (cl. 4) The land sold to the purchaser shall be free from any

encumbrances immediately prior to the handing over of vacant possession of the building to the purchaser.

The loan was secured by a legal charge ('the charge') on the lots, and repayment was to be made from the proceeds of the sale of the houses. The defendant then fell into arrears and in May 1981, the plaintiff served on the defendant a formal notice under s. 254 of the National Land Code 1965 ('the NLC'). In June 1981, the plaintiff initiated the OS.

It was found, as a fact, in the trial, that at the material time, the defendant was not a licensed developer under s. 5(1) of the Housing Developers (Control & Licensing) Act 1966 ('the HDA'). It was also found, as a fact, that the plaintiff had notice of the unlicensed nature of the defendant's business and express notice of the unregistered nature of the 1st intervener's interest.

The main issue that fell for determination, upon remission from the PC, was the effect of clauses 3 and 4 of the agreement, which appeared to be in contravention of r. 12(1) of the Housing Developers (Control & Licensing) Rules 1970 ('the HDR'), on the validity of the charge. Rule 12(1) of the HDR provides that, "Every contract of sale shall be in writing and shall contain within its terms and conditions provisions to the following effect, namely: ... (b) provisions binding on the licensed housing developer that immediately after a contract of sale has been signed the licensed housing developer shall not subject the land sold to the purchaser to any encumbrance without the prior approval of the purchaser."

Held:

[1] Whilst s. 5(1) of the HDA does not expressly provide that a contract entered into in contravention of the HDA is illegal, it is the duty of the Court to investigate the substance of the legislation to ascertain whether or not the contract is expressly prohibited. If the Court ascertains that the contract is prohibited by the HDA, then the result is that the contract (in the instant case, the charge) is void and unenforceable under s. 24 of the Contracts Act 1950.

[2] A contract will also be void and unenforceable and, perhaps, illegal, if it infringes against public policy. A contract to commit a common law or statutory crime is illegal if it is entered into with the intention of committing the crime. In such a case, the question of intention is not so important as the contract is illegal *ex facie* because of the contravention of the statute. The Court will take judicial notice of that fact and refuse to enforce the contract, even though its illegality is not pleaded by the defendant. The fact that the HDA is a legislation with the primary intention of protecting the consumer makes the contract clearly one which 'on its face' is illegal.

[3] The illegality in the instant case is of the kind for which the HDR (in particular r. 17) and the HDA (in particular s. 18) attract criminal sanctions and, as such, the plaintiff's position was that of *particeps criminis*. In such a case the Court will not interpose actively in favour of the party who is *particeps criminis* in an illegal or fraudulent transaction. The plaintiff's instant claim was clearly beyond the fact of law because it had participated in an illegal transaction. The plaintiff was aiding and abetting or assisting an unlicensed housing developer, ie, the defendant.

[4] The plaintiff was deemed to be aware of the illegality of the charge as it was in the business of lending money and obtaining securities from borrowers and, also, because it was represented by lawyers. Therefore, the plaintiff, as the intended chargee, could not receive such a security as it had no developer's license to provide money for housing development; it also had no authority to provide finance for such an unlicensed housing development by an unlicensed housing developer, ie, the defendant. Consequently the purported charge was a nullity and was incapable of being registered to create any security over the lots.

[5] Clauses 3 and 4 were included into the agreement between the defendant and the 1st intervener with the obvious intention of circumventing the mandatory clauses under the HDR by imposing on the 1st intervener a blanket approval upon the signing of the agreement. Clause 3 clearly infringed on the substance of r. 12(1) of the HDR by negating the effect of clause 4; it purported to confer authority on the defendant to create a charge binding on the purchasers.

[6] Clause 3 of the agreement clearly contradicted the mandatory clauses provided for by r. 12(1)(b) of the HDR; its inclusion was a violation of the letter and spirit of the HDR which protects the purchaser. Any attempt, directly or indirectly, to evade the legislative protection must, necessarily, be struck down.

[7] The charge took effect under s. 243 of the NLC upon registration; however, the instrument of dealing being *void ab initio* would be a void instrument for the purposes of registration, ie, although it was capable of being registered, it was not capable of effecting any charge over the lots. Consequently, there was no effective or valid registered charge as envisaged by the NLC. Thus, the plaintiff could not get an order for sale from the Court - for the pre-requisite to obtaining such an order is that there must be a valid registered charge created in favour of the plaintiff.

[8] Generally, under a strict Torrens system, registration cures defects; however, it is not so if the relevant statute denies this. In the instant case, s. 340(2)(b) of the NLC denied the registration and the Court could not cure the defect of the void instrument. And if the Court cannot cure the defect in an instrument, nothing will be achieved by registration except, perhaps, deferred indefeasibility. Thus, although the title or interest of the defendant was free from the encumbrance of the purported charge, it was not free from that of the 1st intervener.

[9] The NLC can only authorise the sale of land subject to charges lawfully created under s. 241. And as there was a sufficient cause to the contrary in the instant case, the plaintiff's application for an order for sale should be dismissed.

Obiter dicta:

[1] Where the system of registration of titles is one of deferred indefeasibility, as it is in Malaysia, there is no real barrier, in principle, to a generous application of equity subject to the provisions of the NLC.

[2] Rights should not be lost in the 'welter of registration', more so where equitable interests and equities are recognised in the Torrens system and the NLC. The extension of personal actions against purchasers with actual notice of unregistered interests reflects the changing social conditions that form the background to modern conveyancing. In the light of the these conditions, it does not seem imperative to cling absolutely to the policy that prevailed in the 19th century.

[3] The law should be sufficiently flexible to protect those who have not, or are unable, to arrange their affairs in a manner most beneficial to themselves. One aspect of the latest development in equity is the increasing penetration of equitable doctrines into contract and commercial law. If equity is willing to intervene in circumstances where resources abound, one might expect it to be more sympathetic towards parties less well endowed with resources.

[4] Admittedly, introducing equity into the Torrens system and the NLC entails uncertainties - whether it be uncertainties as to the type of conduct deplored, or uncertainties as to the status of one's title - but to demand too great a certainty in the law is to cry for the moon. The existing approach provides the system with a degree of flexibility necessary to meet the demands of a property-owning community. There is sufficient latitude within existing authorities to cater for this development, and this is so, especially, where the nature of the Torrens system in Malaysia provides for deferred rather than immediate indefeasibility.

[Plaintiff's application for order for sale dismissed; the charge to be cancelled; and the lots to be transferred to the interveners]

[Remission from Privy Council, Appeal No: 2 of 1986; and Supreme Court, Kuala Lumpur, Civil Appeal No: 281 of 1992]

Cases referred to:

Kheng Soon Finance Bhd. v. M.K. Retnam Holdings Sdn. Bhd. & Ors. [1983] 2 MLJ 384 ***(refd)***

Bhagat Singh s/o Surain Singh v. M.K. Retnam Holdings Sdn. Bhd. [1984] 2 CLJ 100 ***(refd)***

M.K. Retnam Holdings Sdn. Bhd. v. Bhagat Singh s/o Surain Singh [1985] 2 MLJ 212 ***(foll)***

Kheng Soon Finance Bhd. v. M.K. Retnam Holdings Sdn. Bhd. & Bhagat Singh [1989] 1 SCR 291; [1981] 1 MJ 457 ***(refd)***

Lloyds Bank Ltd. v. EB Savory & Co. [1933] AC 201 ***(refd)***

St. John Shipping Corp. v. Joseph Rank Ltd. [1957] 1 QB 267 ***(foll)***

Mahmoud and Ispahani, Re [1921] 2 KB 716 ***(foll)***

Chung Khiaw Bank Ltd. v. Hotel Rasa Sayang Sdn. Bhd. & Anor. [1990] 1 MLJ 356 ***(refd)***

Archbolds (Freightage) Ltd. v. S Spanglett Ltd. [1961] 1 QB 374 ***(foll)***

Beresford v. Royal Insurance Co. Ltd. [1938] AC 586 ***(foll)***

Gordeon v. Chief Commissioner of Metropolitan Police [1910] 2 KB 1080 ***(refd)***

Daiman Development Sdn. Bhd. v. Mathew Lui Chin Teck [1980] 3 PCC 637 ***(refd)***

Che Wan Development Sdn. Bhd. v. Co-operative Central Bank [1990] 2 MLJ 365 ***(foll)***

Tinsley v. Milligan [1993] 3 WLR 126 ***(refd)***

Mogul Steamship Co. v. McGregor Gow & Co. [1892] AC 25 ***(refd)***

Singma Sawmill Co. Sdn. Bhd. v. Asian Holdings (Industrialised Buildings) Sdn. Bhd. [1980] 1 MLJ 21 ***(refd)***

SEA Housing Corp. Sdn. Bhd. v. Lee Poh Choo [1982] 2 MLJ 31 ***(foll)***

Public Finance Bhd. v. Narayanasamy [1971] 2 MLJ 32 ***(refd)***

Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors. [1983] 1 MLJ 81 ***(refd)***

UMBC Bhd. v. Sykt Perumahan Luas Sdn. Bhd. (No. 2) [1988] 3 MLJ 352 ***(refd)***

UMBC Bhd. v. Chong Bun Sun & Another Application [1994] 2 MLJ 221 ***(refd)***

Bahr v. Nicolay [1988] 78 ALR 1 ***(refd)***

Lyus v. Prowsa Developments Ltd. [1982] 2 All ER 953 ***(refd)***

Commercial Bank of Australia Ltd. v. Amadio [1983] 57 ALJR 158 ***(refd)***

Stern v. McArthur [1988] 62 ALJR 588 ***(refd)***

Frazer v. Walker & Ors. [1967] 1 All ER 649 ***(refd)***

Breskvar v. Wall [1972] 46 ALJR 68 ***(refd)***

Gibbs v. Messer [1891] AC 284 ***(refd)***

Ong Chat Pang v. Valliappa Chettiar [1971] 1 MLJ 224 ***(refd)***

Vasquez v. R [1994] 1 WLR 1304 ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 24

Housing Developers (Control and Licensing) Act 1966, ss. 3, 5(1), 18, 24

Housing Developers (Control and Licensing) Rules 1970, rr. 12(1), (b), 17

National Land Code 1965, ss. 241(3), 243, 253(1), 256, 257, 340(1), (2)(b)
Specific Relief Act 1950, s. 38(2)

Other source referred to:
Statutory Interpretation, FAR Bennion, 1st Edn., para. 143

For the plaintiff/applicant - Jayanthi Pillai; M/s. Kadir, Tan & Ramli
For the 1st & 5th - 12th interveners - Hira Singh; (Asbir Kaur Sangha with him) M/s. Asbir, Hira Singh & Co.
For the 4th intervener - Minderjit Kaur; M/s. Minderjit & Co.

JUDGMENT

Anuar Zainal Abidin J:

The Nature of These Proceedings

This is very exceptional case. It is one of the rare occasions upon which their Lordships of the judicial committee of the Privy Council have been persuaded by a Counsel to present his arguments to the board of the Privy Council by way of remission. Mr. Hira Singh who was the Counsel appearing before their Lordships was given the honour to present his arguments on the following grounds:

> ... the broader point of illegality stemming from the unlicensed nature of the first respondent's (developer's) business was not one of which he could have reasonably been aware until after the decision of the Federal Court [1985] 2 MLJ 212) when the matter came to light, as their Lordships have been given to understand, as a result of an admission of the first respondent's director in the course of his cross-examination in the specific performance action. But secondly, and more importantly, the point is a substantial one which raises directly the question of the legality of the charge. It is well-established as a general principle that the illegality of an agreement sued upon is a matter of which the Court is obliged, once it is appraised of facts tending to support the suggestion, to take notice *ex proprio motu* and even though not pleaded (see e.g. *Edler v. Auerbach* [1950] 1 KB 359) for clearly, no Court could knowingly be party to the enforcement of an unlawful agreement.

(*Keng Soon Finance Berhad v. M.K. Retnam Holdings* [19891] SCR 291 at 303 b5)

The judicial committee of Privy Council concluded at p. 303 g4 that:

> ...there is clearly a substantial issue of fact which may have a material bearing upon the matter and upon which neither Mr. William Stubbs QC (for the plaintiff) nor Mr. W.S.W. Davidson, for the first respondent (defendant), **have any present instructions,** as to the extent to which the appellant (Keng Soon Finance Berhad) was aware or must be deemed to have been aware of the terms of the sale agreements and of the unlicensed nature of the first respondent's business. It does not appear to their Lordships, therefore, that the difficulty can be met simply by adjourning the matter in order to enable the parties to prepare further arguments, for there are substantial questions both of law and fact which are

> best determined, and, as far as issues of fact are concerned, can only be determined by the Courts of Malaysia.
> (Emphasis supplied)

The issues for the determination of this Court are:

> restricted to the points arising out of the Rules and the unlicensed nature of the first respondent's (defendant's) business ...
> ([1989] 1 SCR 304C)

which had been canvassed before the Privy Council, and to make the appropriate orders for costs.

The Proceedings Prior to the Hearing Before Datuk Wan Hamzah Salleh J (as he then was)

This action was commenced by the plaintiff in the High Court by originating summons issued on 27 June 1981. In the originating summons, the plaintiff sought an order that the lands held under HS(D) Ka. 2448/78 to HS(D)Ka. 2506/78, Lots No. 13507 to 13565, all in the Mukim of Ulu Kinta, Perak and charged to the plaintiff *vide* Charge Presentation No. 1730/79 Vol. 775 Folio 19 (hereinafter referred to as "the lands") be sold by public auction under ss. 256 and 257 of the National Land Code 1965 to satisfy the total sum due to the plaintiff at the date of such order and interest thereon to the time of sale, and consequential relief. The plaintiff claimed to be the chargee under the charge.

By a Summons-in-Chambers dated 1 July 1982 Bhagat Singh s/o Surain Singh (hereinafter referred to as "the first intervener") applied for an order that he be allowed to intervene and be added as an intervener in the action.

This application was supported by an affidavit affirmed by him on 1 July 1982. In this affidavit, he stated, *inter alia*, that he had entered into a sale and purchase agreement dated 3 November 1978 with the defendant under which he had agreed to purchase from the defendant one of the lots comprised in the lands, with a house being erected thereon; that to date he had paid a total of RM12,227.50 to the defendant; and that he was not in arrears with any stage progress payments.

The Hearing Before and Judgment of Datuk Wan Hamzah Salleh J (as he then was)

The originating summons and the said Summons-in-Chambers of the first intervener were heard on 25 August 1982 by Datuk Wan Hamzah J., who heard submissions from Counsel for the plaintiff, the defendant and the first intervener. There was no cross-examination of any of the deponents and no oral evidence was called by any party.

At the conclusion of the hearing on 25 August 1982, Datuk Wan Hamzah J made orders that the first intervener be allowed to intervene in the proceedings, and that the originating summons be dismissed with costs to the defendant and the first intervener, such costs to be taxed. The bill of costs has been taxed and paid.

On 14 December 1982, Datuk Wan Hamzah J delivered a judgment in which he gave his reasons for making the said orders. The plaintiff appealed against the said orders to the Federal Court. His Lordship's reason, *inter alia*, was:

> The defendant opposes the plaintiffs application for order of sale on the grounds set out in the affidavit dated 8 September 1981 affirmed by the chairman and managing director of the defendant company. One of the grounds is stated in paras. 4 to 7 of the affidavit as follows:
>
> 4. The said land was divided into 59 units of single storey terrace lots but before I made an application to the plaintiff company for the said loan most of the houses had already been purchased by the various people.
>
> 5. During the course of the negotiations for the loan, the plaintiff company obtained from me a list of the names and addresses of the purchasers who had entered into agreements with the defendant company for the purchase of the houses and therefore before the loan was made to the defendants the plaintiffs were fully aware that the various purchasers had already acquired beneficial interests in this property.
>
> 6. The said purchasers have paid to the defendant company a total sum of approximately RM524,612 so far by way of part payments towards the purchase price of the houses.
>
> 7. During the course of the negotiations with the plaintiff company, I specifically informed the plaintiff company that the purchasers had acquired a good title and under no circumstances were their rights to be extinguished or put into jeopardy.
>
> The sale and purchase agreements entered into between the defendant and the purchasers are identical, and clauses 3 and 4 thereof are relevant and they read as follows:
>
> 3. Subject to the provisions of clause 4 hereof, the purchaser agrees that the vendor may subject the land sold to the purchaser to encumbrances at any time after the signing of this agreement.
>
> 4. The land sold to the purchaser shall be free from any encumbrance immediately prior to the handing over of vacant possession of the building to the purchaser.
>
> From the evidence tendered I am satisfied that at the time of negotiating with the defendant and before the execution of the charge the plaintiff was aware that the defendant had sold the lots, and the plaintiff ought to have enquired about the sale and purchase agreements and be aware of the clauses 3 and 4

> thereof. It is expressly provided that clause 3 is to take effect subject to clause 4. In my opinion this means that the encumbrances which may be imposed on the land under clause 3 must be such that they would not put the land in jeopardy of being sold, because if there was such jeopardy this would prevent vacant possession of the land being handed over to the purchasers free from encumbrances in accordance with clause 4. In other words clauses 3 and 4 exclude a charge of the land. The plaintiff ought not to have accepted a charge of the lots which had already been sold by the defendant. In my opinion the charge is unenforceable to obtain an order of sale for the reason that the plaintiff had taken the charge while it ought to be aware of the position resulting from clauses 3 and 4.

His Lordship Datuk Wan Hamzah J held the charge to be invalid and unenforceable as a consequence resulting from clauses 3 and 4 of the sale and purchase agreement.

The Federal Court stated in its judgment that Datuk Wan Hamzah J gave two reasons for his dismissal of the originating summons: see *Kheng Soon Finance Bhd v. M.K. Retnam Holdings Sdn. Bhd. & Ors.* [1983] 2 MLJ 384.

Salleh Abas CJ (as he then was) delivering the judgment of the Federal Court said at p. 386:

> The learned Judge's ruling:
>
> In dismissing the appellant's application to foreclose the charge the learned Judge held that the charge was unenforceable because clauses 3 and 4 of the sale and purchase agreement **did not allow the respondent to create the charge** but only such encumbrances as would not place the land in jeopardy of being sold, because otherwise the purchasers would not be entitled to vacant possession free of encumbrances which they were entitled to under the agreement. As an alternative ground the learned Judge held that the loan was extended and that being the case the appellant should not be entitled to the foreclosure.
> (Emphasis supplied)

By a notice of appeal dated 25 October 1982 the plaintiff appealed to the Federal Court from the order of Datuk Wan Hamzah J dated 25 August 1982.

The said appeal was heard by the Federal Court on 5 July 1983, when the Federal Court heard submissions by Counsel for the plaintiff, the defendant and the first intervener respectively. At the conclusion of this hearing the Federal Court directed that the said appeal should stand adjourned for judgment.

On 4 August 1983 the Federal Court delivered its judgment [1983] 2 MLJ 384, and made an order dismissing the said appeal with costs.

The Hearing Before, and Judgment of, Abdul Razak bin Datuk Abu Samah J (as he then was)

On 28 March 1983, prior to the hearing of the appeal before the Federal Court on 5 July 1983, the first intervener filed a Civil Suit No: 241/1983 in the High Court of Malaya at Ipoh against the defendant for specific performance of the sale & purchase agreement dated 3 November 1978 and contractual statutory indemnity under the Rules made under the Housing Developers (Control and Licensing) Act 1966 (hereinafter referred to as "HDA 1966").

After hearing evidence from both parties at the trial, Abdul Razak J on 4 May 1984 - after the Federal Court had given judgment on 4 August 1983 - delivered the judgment (*Bhagat Singh s/o Surain Singh v. M.K. Retnam Holdings Sdn. Bhd.* [1984] 2 CLJ 100) and ordered:

(a) the defendant do specifically perform the sale & purchase agreement dated 3 November 1978 entered between it and Bhagat Singh s/o Surain Singh;

(b) that indemnity be paid by the defendant to the plaintiff at 12% per annum on the purchase price from 2 May 1980 till the date of delivery of vacant possession of the land held under HS(D) Ka. 2484/78 for PT 13543, Mukim of Ulu Kinta, District of Kinta, State of Perak together with the house erected thereon by the defendant to the plaintiff, and

(c) that the defendant's counterclaim be dismissed with costs.

To date, the defendant has not complied with the orders of Abdul Razak J. The amount of indemnity now due and payable by the defendant far exceeds the balance of the purchase price payable by the first intervener under the contract but not due as yet because the housing project has been abandoned.

Abdul Razak J in his judgment made, *inter alia*, the following findings of facts:

at p. 102 para. 3 (contd.)

> One cannot conceivably imagine in any case, even if an application for an extension of time had been made, how it could ever have been approved at all because it was clear that at all relevant times the defendant had no licence to act as a developer which was a criminal offence under the Act.

at p. 102 para. 6

> In my view, specific performance should lie against the defendant. The defendant said it could not be levied against them since if the appeal by Keng Soon Finance succeeded, then the land would be foreclosed. But I do not see how that should affect the defendant's obligation to the plaintiff to complete the house. If Keng Soon should decide to foreclose the land later, that seems to me to be a matter strictly between Keng Soon and the plaintiff. It has ceased to be the concern of the defendant. In any event, even if Keng Soon Finance should succeed, they could not be expected to foreclose the land without taking into account the

interest of the plaintiff, since Keng Soon Finance was fully aware of the right of the latter against the defendant because they had called for and had notice of the agreement (first agreement) before they even decided to issue the loan, as can be seen from the judgment of the Federal Court. It seems to me that under the circumstances equity demands that their right must be subject to the prior right of the plaintiff. Where the equities are equal, the first in time must prevail.

The Hearing Before, and Judgment of, the (then) Supreme Court (Hashim Yeop A. Sani, Syed Agil Barakbah & Wan Hamzah SCJJ)

The defendant appealed to the Supreme Court against the whole of the decision of Abdul Razak J. The appeal was dismissed with costs; the Supreme Court confirming that the learned Judge was right in declaring the supplementary agreement void on the ground that the defendant contracted out of the letter and spirit of the Housing Developers (Control and Licensing) Rules 1970 (hereinafter referred to as "HDR 1970"). The admitted aim of the supplementary agreement was to defeat the object of a statute whose primary object is to protect the weak against the strong (see the judgment of the Supreme Court delivered by YA Tan Sri Dato' Hashim Yeop A. Sani SCJ in *M.K. Retnam Holdings Sdn. Bhd. v. Bhagat Singh s/o Surain Singh* [1985] 2 MLJ 212 at 213).

The Proceedings Prior to Hearing Before the Appeal to the Judicial Committee of the Privy Council.

By an order of the Federal Court (Raja Azlan Shah LP, Hashim Yeop A. Sani and Abdoolcader FJJ) dated 12 December 1983, it was ordered that final leave be granted to the plaintiff to appeal to his Majesty the Yang Di Pertuan Agong against the whole of the above-mentioned order of the Federal Court dated 4 August 1983.

By special leave of the board of the Privy Council, the first intervener, applied to respond to the appeal as a poor person and the same was granted on 6 October 1988.

The Hearing Before, and Judgment of the Judicial Committee of the Privy Council

The hearing before the board was held on 13 February 1989 and the judgment of their Lordships was delivered by Lord Oliver of Aylmerton on 6 March 1989 allowing the appeal against the defendant and remitted the originating summons to the (then) Supreme Court of Malaysia for its adjudication as against the first intervener. (*Keng Soon Finance Bhd. v. M.K. Retnam Holdings Sdn. Bhd. & Bhagat Singh* [1989] 1 SCR 291, [1981] 1 MLJ 457).

The Hearing Before the (then) Supreme Court on Remission

On 24 September 1990, the Supreme Court consisting of Tan Sri Dato' Hj. Mohd. Azmi Dato' Hj. Kamaruddin SCJ, Dato' Ajaib Singh SCJ and Tan Sri Dato' Hj. Mohd. Jemuri Serjan SCJ heard and considered the submissions of Encik Kadir Kasim of Counsel for the plaintiff, Mr. W.S.W. Davidson of Counsel for the defendant and Mr. Hira Singh of Counsel for the first intervener and ordered:

(a) the originating summons be further remitted to the High Court of Malaya at Kuala Lumpur for determination of all questions referred by the judicial committee of the Privy Council;

(b) the parties to file pleadings; and

(c) an early hearing of the action.

The Hearing Before me as a High Court Judge on Remission

On 27 October 1993, after all parties had filed their pleadings pursuant to the Supreme Court order dated 24 September 1990 and answered interrogatories, the hearing commenced. However, neither the defendant nor its Counsel were present. The defendant's solicitors, Azman Davidson & Co. discharged themselves. The plaintiff changed its solicitors from Shearn Delamore & Co. to Kadir, Tan & Ramli.

The first Intervener, gave evidence on his own behalf and Miss Chia Lee Siew gave evidence on behalf of the Secretary of Licensing Division, Ministry of Housing and Local Government. She clearly stated that the defendant had no licence in its possession at the material times. She further stated that subsequent attempts to obtain the developer's licence were irregular, and no valid licence was issued subsequently.

As far back as 4 May 1984, Abdul Razak J in *Bhagat Singh s/o Surain Singh v. M.K. Retnam Holdings Sdn. Bhd.* [1984] 2 CLJ 100 at 102, *inter alia*, said:

> One cannot conceivably imagine in any case, even if an application for an extension of time had been made, how it could ever have been approved at all **because it was clear that at all relevant times the defendant had no licence to act as a developer which was a criminal offence under the Act**. [Emphasis added]

In this case Encik Md. Kamil bin Md. of the Ministry of Housing and Local Government and a witness for the defendant had given evidence that the defendant was not licensed. This was revealed in evidence by Miss Chia Lee Siew who is presently holding the same position as Encik Md. Kamil. She categorically stated and this is not challenged that: "On 8 February 1979 M.K. Retnam Holdings Sdn. Bhd. was not issued with a developer's licence" and consequently, the developer could not advertise the sale of houses without an

advertisement permit. The charge was presented for registration on 8 February 1979.

She was cross-examined at length by Counsel for the plaintiff but she stood her grounds and documentary evidence supported her testimony. She in fact suggested that the defendant had tried to do some hanky panky and she further stated that the Controller did not give any approval for the change of sale and purchase price or any waiver or extension of time. She stated that the defendant had failed to obtain the developer's licence as it could not meet the conditions that were imposed by the Ministry of Housing. I accept her testimony.

It would have saved judicial time if this reported judgment *Bhagat Singh s/o Surain Singh v. M.K. Retnam Holdings Sdn Bhd* [1984] 2 CLJ 100 on the matter and directly relevant to the issue before the judicial committee of the Privy Council had been conceded. The Counsel for both the chargor and the chargee said they did not:

> have **any present** instructions, as to the extent to which the appellant was aware or must be deemed to have been aware of the terms of the sale agreements and of the unlicensed nature of the first respondent's business.

(*Keng Soon Finance Berhad v. M.K. Retnam Holdings* [1989] l SCR 291 at p. 303 h)

They ought to have conceded and the board of the judicial committee would have decided on the issue without remission to me. Mr. Hira Singh had submitted that the fact in the case was settled before the board of the judicial committee of the Privy Council on this issue. See *Keng Soon Finance Bhd. v. M.K. Retnam Holdings Sdn. Bhd. & Bhagat Singh* [1989] SCR 291 at 301 g2 to g4, Lord Oliver in the same judgment on p. 301 f to h stated:

> It emerged in the course of the hearing, however, that the first respondent was in fact not a licensed housing developer.

The plaintiff and the defendant answered the interrogatories on 14 February 1992 and 18 November 1991 respectively and were referred to during the hearing.

(a) The plaintiff, by para. 3 in answer to the third interrogatory, admitted that it did not enquire as to whether the defendant was a licensed housing developer under the HDA 1966 and the rules made thereunder at the material time.

(b) The defendant by para. 5 in an answer to the fifth interrogatory, admitted that it was not on 3 November 1978, the date of the sale & purchase agreement between the defendant and the first intervener, in possession of developer's licence issued under the HDA 1966 and the rules made thereunder.

(c) The defendant by para. 10 in answer to the 10th interrogatory further admitted that it had described itself as a housing developer pursuant to s. 5 HDA 1966 in the recital to the sale & purchase agreement entered with its purchasers and further by para. 13 in answer to the l4th interrogatory, the defendant when creating the charge stated to the plaintiff that the said lands were expressly subject to the interveners' right.

(d) The defendant by para. 12 in answer to the 13th interrogatory stated that **"it did obtain the prior approval of the intervener before creating a charge over the said land in para. 3 of the said sale & purchase agreement"** when there is clear evidence that the intervener was never asked and never ever gave any approval to the creation of the charge over the said land.

I make concurrent finding that the defendant was not licensed under the HDA 1966 and it did not have such licence in its possession at all material times. The evidence both oral and documentary produced by the interveners is unrebutted as the plaintiff failed to come to Court to give evidence. The evidence as given not only stands unrebutted but on the balance of probabilities, I am satisfied that the evidence adduced is both credible and believable. From such evidence I hold that the plaintiff had notice of the unlicensed nature of the defendant's business and express notice of the unregistered nature of the intervener's interest.

From all the evidence adduced and other admissions on oath, I find as a fact and concur with my learned brother Judge Abdul Razak's finding in *Bhagat Singh s/o Surain Singh v. M.K. Retnam Holdings Sdn. Bhd.* [1984] 2 CLJ 100 that both the developer and the financier were not licensed under the HDA Act 1966 and had no licence in their possession at the material times. In this respect Wan Hamzah J's findings on 25 August 1982 are relevant.

Grace Gnanabaai d/o Jesudasan, another intervener represented by Ms. Minderjeet Kaur gave evidence on her own behalf. It was substantially similar to that of the first intervener.

Ms. Jayanthi Pillay, Counsel for the plaintiff (now known as Mayban Finance Berhad) did not adduce any evidence despite stating that she would do so. She was given an adjournment to bring witnesses. The rest of the interveners elected to accept the decision in the first intervener's case and relied on the evidence tendered in Court.

The Charge under the National Land Code and the Unlicensed Nature of the Borrower's Business:

By s. 5(1) Housing Developers (Control and Licensing) Act 1966 (No. 38 of 1966) it is provided that:

> No housing development shall be engaged in, carried on or undertaken except by a housing developer in possession of a licence issued under this Act.

Section 3 HDA 1966 provides that:

> *'housing development'* means the business of developing or *providing monies for developing* or purchasing, or of partly developing and partly providing monies for purchasing, more than four units of housing accommodation which will be or are erected by such development; and for the purposes of this definition 'develop' means to construct or *cause to be constructed*, and includes the carrying on of any building operations for the purpose of constructing housing accommodation in, on, over or under any land with the view of selling the same or the land which would be appurtenant to such housing accommodation. (Emphasis supplied)

These provisions have been amended by Act A703 with effect from 1 December 1988. However, the provisions as quoted above were in operation at all material times relevant to this case.

It is clear from the above provisions that a housing developer must be in possession of a licence issued under the Act before it engages in carrying on or undertaking the housing development. This is an absolute prohibition. The housing development has been defined and it includes situations where a person (financier) provides monies for such development.

Failure on the part of a contracting party to enquire into, and ascertain, the capacity of the customer as the other party to the contract, prior to entering into the contract, can amount to gross negligence where there is a duty to enquire. It is possible that where there is such a duty and one party deliberately fails to make the appropriate enquiries, such failure may amount to fraud. As a matter of banking practice, a bank will routinely ask for, and will refuse to effect a contractual relationship, until the customer has provided information about the nature of his business, and in particular that any licence necessary for the conduct of that business has been obtained and is valid. This will be so whether or not the bank is lending money and taking security for that loan. In this case, the defendant admitted that such enquiries were in fact not made in a situation where such an enquiry should have been made in light of the business which the borrower conducted. Further, it is clear from the offer letter dated 25 November 1978 that the bank did not make the grant of the loan conditional upon the developer obtaining or producing a valid developer's licence.

In *Llyods Bank Ltd. v. E.B. Savory and Company* [1933] AC 201 at 221 Lord Warrington of Clyffe said:

> The standard by which the absence, or otherwise, of negligence is to be determined must in my opinion be ascertained by reference to the practice of reasonable men carrying on the business of bankers, and endeavouring to do so in such a manner as may be calculated to protect *themselves* and *others against fraud* (Emphasis supplied)

The letter of offer from the bank is reproduced below.

K.L. Date: 25 November 1978

Registered
Private & Confidential

The Managing Director,
M.K. Retnam Holdings Sdn. Bhd.
Malayan Bank Chambers (1st Floor)
12 Station Road
Ipoh, Perak

Dear Sir,

Subject: Your Application for Bridging Finance Taman Muhibbah, Tanjong Rambutan

We are pleased to advise that your application for a bridging finance has been approved subject to the following terms and conditions:

(1)	Loan Amount:	RM600,000 (Ringgit six hundred thousand only) to be released as follows:
	RM200,000	On presentation of the charge
	RM400,000	To be released in stages against architect's certificates
	RM600,000	Total secured by charge on property
(2)	Interest Rate	At 11% p.a. with monthly rests, the interest of which to be settled monthly.
(3)	Repayment	From the proceeds of sale of the houses built but not exceeding a period of two years from date of first release of loan. Amount required for the release of each title is RM10,200.
(4)	Security	The loan is to be secured by first legal charge on 59 housing lots Nos. 13507 to 13565 Mukim of Ulu Kinta, District of Kinta (Details of sub-titles to be supplied by you when available).

The loan will be released only when site/building plans have been approved by the authorities and on presentation of all the 59 subtitles for registration.

All legal documentations in respect of this loan should be prepared by our appointed Solicitors, M/s. Maxwell, Kenion, Cowdy & Jones, Ipoh.

Please forward to us your cheque of RM350 for our processing fee.

Kindly confirm the terms and conditions by signing and returning to us the duplicate copy of this letter.

Yours faithfully

For and On Behalf Of
Keng Soon Finance Berhad
Sgd
...
Assistant Manager

We accept the above terms and conditions
Sgd
...
Company's chop and Signature

It is clear that the offer letter (condition 4) requires the loan to be fully secured by first legal charge on the lands but it has ignored the basic fact: the absence of capacity of the chargor to effect a charge under the National Land Code. The plaintiff admitted that it had not enquired of the defendant whether it was in possession of developer's licence.

The offer letter makes it clear that the loan was provided to the defendant as bridging finance for the housing development noted therein, and on the terms and conditions stated in the letter. The defendant accepted the offer of the loan on the terms and conditions set out in that letter by signing a duplicate copy of that letter and returning it to the lender. Condition 3 of that letter stated that repayment of the loan was to be made from the proceeds of the sales of the houses, constructed by the defendant, and condition 4 required the loan to be secured by a first legal charge over the 59 lots which comprised the estate on which the housing development was to be constructed. There was no requirement, in the letter or otherwise, for the chargor to produce a housing developer's licence or give any details of such a licence in its name. From this it is clear that the grant of the loan was not conditional upon the production of a valid licence. The conclusion that can be made as a result of this was that the plaintiff was happy and willing to provide the loan money regardless. of whether or not the developer was licensed as required under the Housing Developer's Act.

A Court will not enforce a contract 'which is expressly or impliedly prohibited by statute' (*St. John Shipping Corp. v. Joseph Rank Ltd.* [1957] 1 QB 267, per Devlin J at 283). Such a contract 'is unenforceable whether the parties mean to break the law or not': *ibid*. Thus Whilst s. 5(1) of the HDA does not expressly provide that any contract entered into in contravention of the Act is illegal, it is the duty of the Court to investigate the substance of the legislation to ascertain whether or not the contract is expressly prohibited: *Re Mahmoud and Isphani* [1921] 2 KB 716. When the Court ascertains that the contract has been prohibited by the Act, then the result is that such a contract (in this case charge) is void and unenforceable: see s. 24 of the Contracts Act, 1950:

24. The consideration or object of an agreement is lawful, unless -

(a) it is forbidden by a law;

(b) it is of such a nature that, if permitted, it would defeat any law;

(c) it is fraudulent;

(d) it involves or implies injury to the person or property of another; or

(e) the Court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

The Supreme Court in *Chung Khiaw Bank Ltd. v. Hotel Rasa Sayang Sdn. Bhd. & Anor.* [1990] MLJ 356 at 361 F left, held:

> Thus, in our view, it may be stated as a general principle that a contract the making of which is prohibited by statute expressly or by implication, shall be void and unenforceable unless the statute itself saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself.

A contract will also be void and unenforceable, and perhaps illegal, if it infringes public policy. A contract to commit a common law or statutory crime will be illegal if it is entered into with the intention of committing the wrong. The rule has been applied when the design or object is to defraud a third party, in this case, the purchasers of the housing accommodation. In such a case the question of intention is not so important as the contract would be illegal *ex facie* because of the contravention of the statute. The Court takes judicial notice of the fact and refuses to enforce the contract, even though its illegality has not been pleaded by the defendant. The fact that the HDA is a legislation with the primary intention of protecting the consumer makes the contract clearly one which 'on its face' is illegal: *Archbolds (Freightage) Ltd. v. S. Spanglett* [1961] 1 QB 374.

The illegality in this case is of the kind for which the Housing Developers Rules (in particular r. 17) and the Act (in particular s. 18) attract criminal sanctions and as such the plaintiff's position is that of *particeps criminis*. In such a case the Court will not interpose actively in favour of a party who is *particeps criminis* in an illegal or fraudulent transaction: *Beresford v. Royal Insurance Co. Ltd.* [1938] AC 586 at 596(2). The plaintiff's claim here is clearly beyond the fact of law because it has participated in the illegal transaction (*Gordeon v. Metro* [1910] 2 KB 1080 at 1090 per Buckley).

The plaintiff was aiding and abetting or assisting the unlicensed housing developer. Lord Oliver in his judgment at p. 302 between line B and C:

> Moreover, an unlicensed developer, who, is carrying on business unlawfully, certainly could not claim to be in a better position than a licensed developer. If this is right, then it would follow that the charge in the absence of express approval by individual purchasers, was created by the first respondent without the authority of the purchasers, of whose interests, quite clearly, the appellant had express notice before the charge was entered into.

Sir Garfield Barwick in *Daiman Development Sdn. Bhd. v. Mathew Lui Chin Teck* [1980] 3 PCC 637 at p. 647 d5 has this to say:

> it seems to their Lordships that upon the proper construction of the proforma [used in that case] the solicitors [for the developer there] would not be able to include in the contract of sale any term or condition which was not appropriate to effectuate the sale which had been made, including for that purpose, of course, provisions to comply with the requirements of the rules.

His Lordship Justice N.H. Chan (as he then was) had occasion to discuss the same issue and held that where the only illegality of agreement (charge) is that it infringes a statute which was passed for the benefit of a class of persons of whom the Interveners are members, then the illegality will not prevent them from recovering. (see *Che Wan Development Sdn. Bhd. v. Co-operative Central Bank Bhd.* [1990] 2 MLJ 365). Furthermore the claimant to an interest whether based on a legal or equitable title, is entitled to recover if he was not forced to plead or rely on an illegality: *(Tinsley v. Milligan* [1993] 3 WLR 126 HL).

A contract that is illegal as formed in its inception and is therefore void *ab initio* is treated as if it had not been made at all; *(Mogul Steamship Co. v. McGregor, Gow & Co.* [1892] AC 25 at p. 39 per Lord Halsbury).

In any event the plaintiff is deemed to have been aware of the illegality of the charge for the following reasons:

(i) the plaintiff was in business of lending money and obtaining securities from the borrowers; and

(ii) the plaintiff was represented by lawyers (see *Singma Sawmill Co.. Sdn. Bhd. v. Asian Holdings* [1980] 1 MLJ 21).

Finally, the parties (chargor/chargee) had clearly evaded the specific prohibitions imposed by the statute. *Statutory Interpretation* by FAR Bennion (First Edn.) at para. 143 states:

> It is the duty of a Court to further the legislator's aim of providing a remedy for the mischief against which the enactment is directed. Accordingly the Court will prefer a construction which advances this object rather than one which attempts to find some way of circumventing it.
>
> Fraud on the Act: The Courts have frequently held that a construction is to be preferred that prevents evasion of the intention evinced by Parliament to provide

an effective remedy for the mischief against which the enactment is directed. When deliberately embarked on, such evasion is judicially described as a fraud on the Act.

The charge was presented and registered on 8 February 1979. It was purportedly created by the defendant under s. 241 of the National Land Code 1965 (NLC). See plaintiffs bundle of documents (Encl. 83): Form 16A NLC.

The section gives powers to the chargor to charge its land subject to sub-section 3 which states:

> (3) The said powers shall be exercisable in any particular case subject to -
>
> (a) any prohibition or limitation imposed by this Act or **any other written law for the time being in force;**
>
> (Emphasis supplied)

Such charge shall be effected by an instrument in Form 16A of the NLC and by s. 243 NLC, such charge created under this Act shall take effect upon registration so as to render the land as security in accordance with the provisions thereof, express or implied.

The plaintiff, as intended chargee, could not receive such a security because it had:

(a) no developer's licence to provide money for housing development; and

(b) no powers to provide finance for such an unlicensed business of the housing development by the unlicensed housing developer.

Consequently the purported charge was a nullity and was incapable of being registered to create any security over the lands: 59 lots.

Fraud on the Purchasers

The sale and purchase agreement between the defendant and the interveners was not in the proper form as required by the Rules made by the Minister of Local Government pursuant to the powers conferred upon him by s. 24 HDA 1966 Housing Developers (Control and Licensing) Rules 1970 prescribed, *inter alia*, terms which are compulsory in every contract of sale. Rule 12(1) provides:

> Every contract of sale shall be in writing and shall contain within its terms and conditions provisions to the following effect, namely: ... (b) provisions binding on the licensed housing developer that immediately after a contract of sale has been signed the licensed housing developer shall not subject the land sold to the purchaser to any encumbrance without the prior approval of the purchaser.

However, the defendant signed an agreement with the interveners and by clauses 3 and 4 of the agreement provided:

3. Subject to the provisions of clause 4 hereof, the purchaser agrees that the vendor may subject the land sold to the purchaser to encumbrances at any time after the signing of this agreement.

4. The land sold to the purchaser shall be free from any encumbrance immediately prior to the handing over of vacant possession of the building to the purchaser.

The defendant had included the above provisions with the obvious intention of circumventing the mandatory clauses made under the Rules by imposing on the purchasers a blanket approval upon the signature of the contract. Clause 3 clearly infringes the substance of r. 12(1) by negativing the effect of clause 4 by purporting to confer authority on the defendant to create a charge binding on the purchasers. The maxim applies:

> *Quando aliquid prohibitur fieri, prohibitur ex directo et per obliquum.* [whenever a thing is prohibited, it is prohibited whether done directly or indirectly].

By including clause 3 of the sale & purchase agreement which clearly contradicts the mandatory clause provided for in r. 12(1)(b) HDR 1970 and on the authority of the Supreme Court: *M.K. Retnam Holdings Sdn. Bhd. v. Bhagat Singh* [1985] 2 MLJ 212, it is a violation of the letter and spirit of the Housing Developers (Control and Licensing) Rules, 1970 and in the words of Tan Sri Hashim Yeop A. Sani SCJ (as he then was) at p. 213 line C4 left:

> The primary object of that legislation is to protect the weak against the strong. See also *SEA Housing Corporation Sdn Bhd. v. Lee Poh Choo* [1982] 2 MLJ 31.

I adopt the reasoning of Tan Sri Hashim Yeop A. Sani SCJ as regards the consumer protection legislation and any attempt directly or indirectly to evade the protection must necessarily be struck down. The aim of the legislation and accompanied subsidiary legislation is clear: to protect purchasers. See *S.E.A. Housing Corp. Sdn. Bhd. v. Lee Poh Choo* [1982] 2 MLJ 31 at 34. Therefore, any attempt to evade the legislation will not be countenanced by the Courts.

The HDA 1966 prohibits the defendant from carrying on housing development and provides criminal sanction for the breach of that prohibition. The defendant not being in possession of the housing development license under s. 5 HDA 1966 is prohibited from carrying on business of housing development, the consequence of which I declare is that the charge is *void ab initio* and unenforceable. See *Public Finance Bhd. v. Narayanasamy* [1971] 2 MLJ 32 at p. 33 where the facts were similar except that in that case there was no authorization of charge by the purchaser. In that case His Lordship Chief Justice Ong was troubled by the existence of the right of third parties, which

the chargee sought to ignore, and found the chargee's conduct so unconscionable as to amount to fraud and collusion and upheld the High Court decision and dismissed the appeal (cf. *Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors.* [1983] 1 MLJ 81).

Indefeasibility

The charge takes effect under s. 243 NLC upon registration but the instrument of dealing i.e., creation of charge being *void ab initio* would be a void instrument for the purposes of registration i.e., although it was capable of being registered, it was not capable of effecting any charge over the 59 lots. As a consequence there is in existence no effective or valid, registered charge as envisaged under the NLC. Therefore, the plaintiff cannot get the order for sale from the Court, for the pre-requisite to obtain the order for sale is that there must be a valid registered charge created in favour of the plaintiff.

Section 340(1) NLC reads as follows:

> The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

The section will operate to give an indefeasibility title/interest under the charge only when the instrument for registration concludes a valid transaction and in statutory form. Sub-section (2) of s. 340 reads:

> operates to prevent a registered instrument from giving an indefeasible title or interest to land where that instrument is subject to a vitiating factor; in this case that vitiating factor was that the instrument was void.

In general under a strict Torrens System, it is now said that registration cures defects but this is not so if the relevant statute denies this right. Here, s. 340(2)(b) denies the registration; the Court cannot cure the defect of a void instrument. As such if the Court cannot cure the defect in the instrument, nothing is achieved by registration except perhaps deferred indefeasibility. Thus, the title or interest of the defendant is free from encumbrances of the purported charge but not that of the interveners.

Edgar Joseph Jr. J (as he then was) in *UMBC Bhd. v. Sykt. Perumahan Luas Sdn. Bhd. (No. 2)* [1988] 3 MLJ 352 at p. 355, para. H left, had the occasion to consider:

> ...what is the effect of registration of the charge in breach of the restriction in interest imposed pursuant to the provisions of s. 124(l)(b) of the Code?
>
> In considering this question, I have kept in the forefront of my mind, on the one hand, the well known canon of construction enunciated by the Federal Court in *Chin Choy & Ors. v. Collector of Stamp Duties* [1979] 1 MLJ 69:

> ... that the meaning and intentions of a statute must be collected from the plain and unambiguous expression used therein rather than from any notions which may be entertained by the Court as to what is just and expedient ...
>
> However unjust, arbitrary or inconvenient the meaning conveyed may be, it must receive its full effect. When once the meaning is plain, it is not the province of a Court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words.

and, on the other hand, the rule that statutes which encroach on the rights of a subject, whether as regards person or property are subject to a strict construction in the same way as penal statutes. It is also a settled rule that such statutes should be construed, if possible, so as to respect such rights *(Walsh v. Secretary of State for India* [1863] 10 HL Cas 367; 11 ER 1068, per Lord Westbury; *Hough v. Windus* [1883-1884] 12 QBD 224., per Bowen LJ) and, if there is any ambiguity, the construction which is in favour of the freedom of the individual should be adopted (*JE David v. SPA De Silva* [1934] AC 106 and *O'Connor v. Isaacs* [1956] 2 QB 288).

His Lordship concluded at p. 356 para. C left:

> ... the charge having been registered in breach of an explicit statutory prohibition imposed on the title to the charged land pursuant to the provisions of s. 120 of the Code, the title or interest of the chargee is defeasible since registration thereof had been obtained by means of an insufficient or void instrument (s 340(2)(b))...

The application for order for sale is purportedly made under s. 253(1) of the NLC which reads:

> The provisions of this chapter shall have effect for the purpose of enabling any chargee to obtain the sale of the land or lease to which his charge relates in the event of a breach by the chargor of any of the agreements on his part expressed or implied therein.

Mr. Justice Visu Sinnadurai stated in *UMBC Bhd. v. Chong Bun. Sun. & Anor. Application* [1994] 2 MLJ 221 at 231 B:

> In *Gondola Motor Credit Sdn. Bhd. v. Almurisi Holdings Sdn. Bhd.* [1992] 2 MLJ 650., Harun Hashim SCJ in delivering the judgment of the Supreme Court also observed as follows (at p. 656):
>
> > ... under s. 256(3), on an application to Court for an order for sale by the chargee, it is mandatory on the Court to order the sale unless it is satisfied of the existence of a cause to the contrary.
>
> The only leeway given to the Court, when considering whether an order for sale ought to be made is that provided for under s. 256(3) which provides that the Court may not grant an order for sale if there is 'any cause to the contrary'. The Privy Council in *Keng Soon Finance v. M.K. Retnam Holdings Sdn. Bhd.* [1989] MLJ 457; [1989] SCR 291, clearly stated that the Courts may only refuse

to make such an order if the making of the order would be contrary to some rule of law or equity: see the Supreme Court decisions in *James Edward Buxton & Anor. v. Supreme Finance (M) Bhd.* [1992] 2 MLJ 481; [1993] 1 SCR 74, where the scope of s. 256(3) was also considered, and *Kuching Plaza Sdn. Bhd. v. Bank Bumiputra Malaysia Bhd. and Another Appeal* [1991] 3 MLJ 163; [1992] SCR 64, where a similar provision in the Sarawak Land Code (Cap 81) was applied.

The NLC spells out in detail the powers of the Court. These are statutory powers and the Court cannot act beyond these powers. Any purported exercise of this power by granting a remedy not authorized by the NLC would be *ultra vires*, the NLC, **resulting in the sale of the charged property being rendered void,** and the registration of the title in the purchaser's name not being indefeasible on the ground that the registration was obtained by means of an insufficient or void instrument: see the judgment of Edgar Joseph Jr. J (as he then was) in *United Malayan Banking Corp. Bhd. v. Sykt. Perumahan Luas Sdn. Bhd. (No. 2)* [1988] 3 MLJ 352, approved by the Supreme Court in *M & J Frozen Food v. Siland Sdn. Bhd.* [1994] 1 MLJ 294; [1994] SCR 197.

Therefore, I hold that the NLC can only authorise the sale of the land subject to charge lawfully created under s. 241 NLC. It cannot authorise the sale of the land under s. 256 NLC which is not the subject to a void albeit registered charge. This being a sufficient cause to the contrary, I dismiss the application for an order for sale.

Mr. Hira Singh submitted the Australian High Court authority of *Bahr v. Nicolay* [1988] ALR 1 (HC-Full Ct.) 78 wherein the facts in brief are as follows.

The Bahrs contracted to sell land to Nicolay. The contract included an agreement by Nicolay to lease the land back to the Bahrs for three years and upon the expiration of the lease to enter into a contract to resell the land to them. Before this happened, Nicolay sold the land to the Thompsons who had notice of the prior agreement between the Bahrs and Nicolay. The contract of sale between Nicolay and the Thompsons provided that the purchaser acknowledged that an agreement existed between the Bahrs and Nicolay. The Thompsons subsequently became the registered proprietor of the land. The Bahrs were unaware of the Thompsons' purchase until after the latter obtained registration. There was correspondence between the Bahrs and the Thompsons which acknowledged the agreement that existed between the Bahrs and Nicolay. A caveat was lodged but was ineffective as against the Thompsons. The Bahrs sought to exercise against the Thompsons their rights under the first contract, i.e. a right to purchase. The Thompsons subsequently denied the Bahrs' claim relying on the indefeasibility provisions of the Transfer of Land Title Act (WA). The Bahrs sought as against Nicolay and the Thompsons, an order that the land vest in them and alternatively specific performance of the first contract.

The High Court of Australia found unanimously, albeit on differing basis, in favour of the Bahrs. The Thompsons were to hold their title to the land subject to the Bahrs' interests.

Basis for the decision

The divergence of views over the basis for subjecting the title of the Registered Proprietor (Thompsons) to the claims of the Bahrs is as follows:

(a) The Bahrs's proprietary action against Nicolay bound the subsequent registered proprietor (i.e. the Thompsons) because the circumstances raised the fraud exception to indefeasibility - per Mason CJ and Dawson J. However this conclusion required a "redefinition" of the fraud exception.

(b) Alternatively, the Thompsons held the land for the benefit of the Bahrs on an express trust, so that the Bahrs had a conventional action *in personam* enforcing a direct and proximate relationship with the registered proprietor.

(c) The Thompsons held the land on a constructive trust for the benefit of the Bahrs.

Thus, the Court was enforcing an indirect and remote relationship between the Bahrs and the defendant registered proprietor - per Wilson and Toohey JJ.

Level of Knowledge Required

Many of the equitable doctrines are premised upon a person's knowledge of a state of affairs being the catalyst to the raising of an equity against him. Without that knowledge, there is no justification in equity for holding him out of the full enjoyment of his rights because his 'conscience' is clear. However, controversy centres upon the level of knowledge one must possess before an equity can be raised against him and so give rise to an action *in personam*. The 'direct confrontation' between the old doctrine of notice and the present 'notice' provision in NLC is at the forefront where there is an allegation of a registered proprietor acting against an unregistered claimant.

Ordinarily actual notice of a prior interest is sufficient to impute fraud in equity. It is my view that in the context of the *in personam* exceptions to indefeasibility, the Court should be astute to look at the circumstances of the case. The substance of the agreement between the parties is crucial since equity looks to substance and not to form. The approach should be to engage in a subjective inquiry as to the intention of the registered proprietor as manifested by his conduct, and then to ask objectively if the conclusion to be reached would be fair in the circumstances. This two-tiered test would serve to preserve the policy of the Torrens legislation or at least part of it. At the

same time, this approach would maintain a level of public confidence in the judiciary and the administration of justice.

Throughout the period when registration statutes have been in force, a tension has existed between literal compliance with them on the one hand, and the desire to read into them general equitable principles on the other. The effect of introducing these principles is to bind a purchaser with notice of an unregistered interest that is not protected in the appropriate manner by registration.

The most popular method of achieving this result has been to apply the maxim that equity will not allow a statute to be used as an instrument of fraud. This maxim displays a continuing rigour, as is demonstrated by the English decision in *Lyus v. Prowsa Developments Ltd* and the Australian decision of *Bahr v. Nicolay* at p. 37 per Brennan J.

In recent times, the "revitalisation" of equity has meant that the concept of unconscionability has had a role to play even in the area of registration of title to land. *Bahr v. Nicolay* and *Kalyk v. Whelan* evidence the continuing existence of equity in the inpersonam exceptions to indefeasibility.

This revival of 'equity' is also seen in the Australian decisions which deny effect to unconscionable actions. In many cases unconscionability arises because there was inequality of bargaining power where one party to the contract suffered from a disability, such as lack of education, or poverty: *Commercial Bank of Australia v. Amadio* [1983] 57 ALJR 158. The fact that in this case the purchasers were the subjects of protection under the consumer protection legislation, namely the HDA, is a factor to be taken into account to allow a sympathetic application of equity in their favour: *Stern v. McArthur* [1988] 62 ALJR 588.

To some, the expanding scope of the *in personam* exceptions to indefeasibility, guided by the notion of unconscionability, presents a further inroad into the principle of indefeasibility of title. Although this development seems to stem from an instinctive reaction that a purchaser with actual notice of an unregistered interest should not be allowed to take free from it, there are sound reasons why equity should intervene.

It should be noted that the expansion of equity in this way has been prominent in the Australian system of registration of titles where the principle of immediate indefeasibility applies: *Frazer v. Walker* [1967] All ER 649, *Breskvar v. Wall* [1972] 46 ALJR 68. Where the system of registration of titles is one of deferred indefeasibility (*Gibbs v. Messer* [1891] AC 284) as it is in Malaysia (see *Ong Chat Pang v. Valliappa Cheldar* [1971] 2 MLJ 224) there is no real barrier in principle to a generous application of equity subject to the provisions of National Land Code.

Rights should not be lost in the "welter of registration" - more so where equitable interests and equities are recognised in the Torrens System and National Land Code. The extension of the personal actions against purchasers with actual notice of unregistered interests reflects the changed social conditions which form the background to modem conveyancing. In the light of the changed conditions, it does not seem imperative to cling absolutely to the policy that prevailed in the 19th century.

The law should be sufficiently flexible to protect those who have not, or are unable to arrange their affairs in a manner most beneficial to themselves. One aspect of the latest development in equity is the increasing penetration of equitable doctrines into contract and commercial law. If equity is willing to intervene in circumstances where resources abound, one might expect it to be more sympathetic towards parties less well endowed with resources.

Admittedly, to introduce equity into the Torrens System and NLC entail uncertainties - whether it be uncertainties as to the type of conduct deplored, or uncertainties as to the status of one's title - but to demand too great a certainty in the law is to cry for the moon. The existing approach provides the system with a degree of flexibility necessary to meet the demands of a property-owning community. There is sufficient latitude within existing authorities to cater for this development and this is so especially where the nature of the Torrens System in Malaysia provides for deferred rather than immediate indefeasibility.

From the undisputed evidence, both oral and affidavits available, I am satisfied that under the circumstances of this case, the interveners are entitled to the titles free from encumbrances to be registered in their respective names without further litigation because the defendant owes to the interveners by way of indemnity for late delivery sums far greater than the balance purchase price payable but not due under the sale & purchase agreement. Since the defendant has abandoned the project and has been wound up on 18 October 1994 *vide* Ipoh High Court Companies Winding-up No: 28-2-1991, there is no prospect of the balance sum ever being demanded by the defendant as the statutory liquidated damages far exceeds the balance purchase price.

I therefore order that:

(a) the application of the plaintiff for order for sale is hereby dismissed with costs;

(b) the plaintiff do pay costs to the first intervener of:

(i) Privy Council hearing in London; and

(ii) Supreme Court (pursuant to the order of the Supreme Court dated 24 September 1990)

The first intervener responded to the appeal by the plaintiff at the Judicial Committee of the Privy Council ('the JCPC') by special leave to respond as *forma pauperis*. The question of costs was reserved by the JCPC, for the determination of this Court. The customary recommendation, to my mind, by the JCPC would have been what is the normal practice that the costs follow the event. I am supported in this respect by a recent decision of the Privy Council: *Vasquez v. The Queen* [1994] 1 WLR 1304 at p. 1316 under the heading "costs".

(c) the plaintiff do deliver to the Registrar of Titles, Perak the original issue documents of title in respect of lands held under the following:

(1) HS(D)Ka. 2455/78 PT No. 13514, Mukim of Ulu Kinta, District of Kinta in the State of Perak;

(2) HS(D)Ka. 2476/78 PT No. 13535, Mukim of Ulu Kinta, District of Kinta in the State of Perak;

(3) HS(D) Ka. 2477/78 PT No. 13536, Mukim of Ulu Kinta, District of Kinta in the State of Perak;

(4) HS(D) Ka. 2480/78 PT No. 13539, Mukim of Ulu Kinta, District of Kinta in the State of Perak;

(5) HS(D)Ka. 2484/78 PT No. 13543, Mukim of Ulu Kinta, District of Kinta in the State of Perak;

(6) HS(D)Ka. 2485/78 PT No. 13544, Mukim. of Ulu Kinta, District of Kinta in the State of Perak;

(7) HS(D)Ka. 2487/78 PT No. 13546, Mukim of Ulu Kinta, District of Kinta in the State of Perak;

(8) HS(D)Ka. 2488/78 PT No. 13547, Mukim of Ulu Kinta, District of Kinta in the State of Perak;

(9) HS(D)Ka. 2494/78 PT No. 13553, Mukim of Ulu Kinta, District of Kinta in the State of Perak;

(10) HS(D)Ka. 2498/78 PT No. 13557, Mukim of Ulu Kinta, District of Kinta in the State of Perak;

with the duplicate charge dated 27 January 1979 for cancellation of the memorials of void charges;

(d) Pursuant to s. 38(2) of the Specific Relief Act, 1950, the Registrar of Titles, Perak is ordered to cancel the charge memorials over the lands held as enumerated above in para. (c); and

(e) the Senior Assistant Registrar of the High Court, Kuala Lumpur do execute a memorandum of transfer over the said lands in favour of the respective interveners.

Reported by Isaac TJ Lee